Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 23 DECEMBER 6, 1989 No. 49

This issue contains:

AVAILABILITY OF BOUND VOLUMES

See inside back cover for ordering instructions

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 101

(T.D. 89–102)

CUSTOMS REGULATIONS AMENDMENT RELATING TO THE DESIGNATION OF TUCSON, ARIZONA, AS PORT OF ENTRY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations governing the Customs field organization by changing the designation of Tucson, Arizona, from a Customs station to a port of entry. Adoption of this proposal alters the relationship of the Customs operations at Tucson from that of a station under the supervision of a port to that of a port in the Nogales District. This redesignation is part of the efforts of Customs to improve the efficiency of its field operations.

EFFECTIVE DATE: November 29, 1989.

FOR FURTHER INFORMATION CONTACT: Linda Walfish, Office of Workforce Effectiveness and Development, Office of Inspection and Control, (202) 566–9425.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of its ongoing effort to improve efficiency and service to the public, the Customs Service continually reviews its field service organization to assure that it best utilizes its resources. This review has identified the current relationship of the port of entry of Nogales and the Customs station of Tucson as one which is in need of modification.

While the status of Tucson as a Customs station was appropriate at the time it was established in 1963 (T.D. 55986), Tucson currently meets or exceeds the minimum criteria for the level of activity necessary for eligibility as a port of entry as identified in T.D. 82–371, amended by T.D. 86–14 and T.D. 87–65.

COMMENTS

Notice of the proposed amendment was published in the Federal Register on May 8, 1989 (54 FR 19577). The three comments received favored Tucson, Arizona, becoming a port of entry.

PORT LIMITS

The limits of the port of entry of Tucson, Arizona are: the city of Tucson, Arizona, including the Tucson International Airport.

EXECUTIVE ORDER 12291 AND REGULATORY FLEXIBILITY ACT

Because this document is related to agency management and organization, it is not subject to E.O. 12291. Accordingly, a regulatory impact analysis and the review prescribed by the E.O. are not required. Although Customs solicited public comments, no notice of proposed rulemaking was required pursuant to 5 U.S.C. 553(a)(2). Accordingly, this document is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*).

DELAYED EFFECTIVE DATE

Pursuant to the Administrative Procedure Act, 5 U.S.C. 553(d), a substantive rule is to be published not less than 30 days prior to its effective date. The statute provides, however, that this requirement may be waived where the agency finds good cause and publishes such finding with the rule, 5 U.S.C. 553(d)(3). Good cause exists for not delaying the effective date inasmuch as the establishment of a port in place of a station confers an economic benefit to the public.

DRAFTING INFORMATION

The principal author of this document was Michael Smith, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, organization and functions (Government agencies).

AMENDMENTS TO THE REGULATIONS

Part 101, Customs Regulations (19 CFR Part 101) is amended as set forth below:

PART 101—[AMENDED]

1. The general authority citation for Part 101 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1623, 1624.

§ 101.3 [Amended]

2. In section 101.3(b), in the Southwest Region, opposite "Nogales" under the heading "Name and Headquarters", insert "Tucson, including the territory described in T.D. 89–102", in alphabetical order, under the column headed "Ports of Entry".

§ 101.4 [Amended]

3. In section 101.4(c) delete "Nogales, Ariz." under the listing of districts, "Tucson," in the column listing Customs stations, and "Nogales" under ports having supervision.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: November 21, 1989.

SALVATORE R. MARTOCHE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, November 29, 1989 (54 FR 49078)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., November 21, 1989.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 89–125)

Carriers: The dutiability of the cost of foreign repairs under 19 U.S.C. 1466.

Date: August 10, 1989
File: HQ 110184
VES–13–18–CO:R:P:C 110184 GV
Category: Carriers

DEPUTY ASSISTANT REGIONAL COMMISSIONER
COMMERCIAL OPERATIONS
C/O REGIONAL COMMISSIONER
New Orleans, Louisiana 70130–2341

Re: Wilmington, North Carolina, Vessel Repair Entry Nos. C15–0008525–8 (*S/S Green Valley;* Mother Vessel) and C15–0008526–6 (*Lash* Barges).

DEAR SIR:

Your memorandum dated April 12, 1989, forwarded an application for a ruling regarding duty under 19 U.S.C. 1466 on the cost of foreign work performed on the subject vessels. Our findings are set forth below.

Facts:

In August, 1984, Central Gulf Lines' *Lash* vessel, the SS *Green Valley,* and its complement of *Lash* barges were chartered by the Navy's Military Sealift Command (MSC) for a period of two to four years of continuous military service at Diego Garcia in the Indian

Ocean. Under the charter, all of the vessels were to be delivered at Subic Bay in the Philippines, with laydays for the barges specified as September 10–15, 1984, and for the *Green Valley* as September 24–October 1, 1984.

At the time the charter was awarded by MSC in August, 1984, the *Green Valley* was in Egypt, having just completed a commercial voyage from the United States. All of the *Lash* barges required by the charter were likewise located aboard the *Green Valley* overseas. Under the terms of the charter, the *Green Valley* and each barge were subject to inspection upon delivery, and each had to be in condition to "remain on station for four years", and to be able "to operate without further inspection for at least two years from delivery". More specifically, the MSC charter contained the following requirements:

1. The hulls, weatherdecks, superstructures and deck machinery areas of the vessels had to be "in a uniformly high state of preservation."
2. Each vessel had to meet the stringent requirements of Article 37(dd) of MSC's Standards of Appearance.
3. As "representatives of the U.S. Government and the Department of Defense", each vessel also had to meet the "highest possible standards of ship smartness". Thus, the hulls, decks, deckhouses—and all appurtenances—had to be "cleaned, preserved and painted", and all necessary maintenance had to be provided before delivery to the Navy in the Philippines.
4. All the *Green Valley's* spaces had to be "lighted to allow safe operation and correct maintenance of machinery and equipment" while on duty for the Navy, and the *Green Valley* had to "be made self-sustaining for the discharge/loading of barges while at anchor", and while operating in "austere port environments" and, if necessary, "at water's edge". The barges, in turn, had to be prepared to meet U.S.C.G. requirements for the "carriage of ammunition" and they, too, had to be altered and prepared to operate in "austere environments".

Since the *Green Valley* and all of the required *Lash* barges were overseas and located far from the United States when the charger was awarded by MSC in August, 1984, it was impossible for Central Gulf to return them to this country to obtain the services and equipment required by the charter and still arrive at Subic Bay in the Philippines by the September/October 1 delivery dates mandated by the charter. Consequently, Central Gulf had to comply with the Charter's requirements by procuring all of the prescribed services, alterations, refittings and equipment in foreign countries while the vessels were enroute from their overseas locations in mid-August, 1984, to the Navy's designated delivery station in the Philippines.

Central Gulf was thus able to meet all of the charter requirements and still deliver the *Green Valley* and its 73 *Lash* barges to the Navy at Subic Bay on time in 1984. There, the vessels were ac-

cepted by the Navy and they continuously operated under the MSC charter at Diego Garcia in the Indian Ocean for a period of four (4) years. During that entire period, none of the vessels returned to the United States. Recently, however, the MSC charter terminated, and on October 24, 1988, the *Green Valley* and its barges reentered this country at Sunny Point, North Carolina.

Counsel for Central Gulf filed an "application for ruling" dated November 1, 1988, with the Carrier Rulings Branch, Customs Headquarters, contending that since the *Green Valley* and its complement of *Lash* barges were continuously overseas on duty for the Navy for more than four years, and since the equipment services, parts and repairs required to comply with the MSC charter could not have been obtained in the United States in time to meet the Navy's designated delivery date in the Philippines, no duty is owed under the vessel repair statute.

Pursuant to 19 CFR 4.14(d)(1)(ii), the aforementioned application was forwarded from Headquarters to the New Orleans Vessel Repair Liquidation Unit (VRLU) for their review and recommendations. In the interim, Central Gulf submitted a request for an extension of time to file an application for remission of duties, dated December 20, 1988, to the New Orleans VRLU. In view of the fact that the six month period for which Central Gulf was liable for duties assessed under 19 U.S.C. 1466 for the *Green Valley* began on June 25, 1984, and ended on December 25, 1984, it was apparent that Central Gulf had over four years to prepare the requisite application for relief and obtain the supporting documentation. The request for an extension of time was, therefore, properly denied on January 3, 1989.

We note, however, that Central Gulf proceeded to submit two (2) "Amended or Supplementary Applications for Relief" after the New Orleans VRLU denied their request for an extension of time. Both of these "Amended or Supplementary Applications for Relief" included an additional claim for relief not requested in the original application of November 1, 1988 (i.e., relief from damage to seventeen (17) barges and two (2) tugs due to Typhoon Warren which hit the Philippines in late October, 1984).

Issue:

Whether the foreign work performed on the subject vessels for which the applicant seeks relief is dutiable under 19 U.S.C. 1466.

Law and Analysis:

Title 19, United States Code, section 1466 provides in pertinent part for payment of duty in the amount of 50 percent ad valorem on the cost of foreign repairs to vessels documented under the laws of the United States to engage in foreign or coastwise trade, or vessels intended to engage in such trade. In this regard it should also be noted that pursuant to 19 CFR 4.14(a)(2)(ii), vessels owned or chartered by the United States Government; if documented with a

registry, coastwise trade, or Great Lakes trade endorsement, or if undocumented, intended to engage in foreign, coastwise or Great Lakes trade, are within the purview of the vessel repair statute.

Furthermore, we are in receipt of a letter from counsel for MSC, dated May 11, 1987, (during which time the *Green Valley* was under a time charter to MSC) stating that the fact that ships are chartered to MSC does not provide any basis for avoiding payment of duties on foreign repairs. We were also furnished a copy of a letter from MSC to all owners and operators of MSC time and voyage chartered ships, dated May 11, 1987, stating that "*Customs duties on foreign repairs imposed upon documented vessels time-chartered or voyage-chartered to the Military Sealift Command are the financial responsibility of the ship owner/operator.*" We have attached copies of both of these letters for your reference.

Accordingly, counsel's argument that 19 U.S.C. 1466 is inapplicable to the *Green Valley* and its *Lash* barges on the basis that the work required was pursuant to a MSC charter is without merit.

We also note that counsel's citations to legal authority in support of his position are clearly distinguishable from the case in issue. In *Sea-Land Service, Inc.* v. *United States*, 638 F. Supp. 1404 (CIT 1988), the court addressed whether, given the nature of the work performed and the specific facts of the particular case, repair work performed on the vessel subsequent to its documentation may be considered to be part of the new construction contract. Simply put, the court considered whether "completion of construction" is a viable concept so as to render the duty provision of 19 U.S.C. 1466(a) inapplicable if proven. The court found completion of new construction to be a valid concept, subject to specific conditions, which are:

1. "All work done and equipment added [must be] pursuant to the original specifications of the contract for the construction of the vessel * * * "
2. "This basic standard is limited to work and equipment provided within a reasonable period of time after delivery of the vessel."

The work performed on the *Green Valley* and its complement of *Lash*barges does not meet the above conditions. In *Corpus Company et al.* v. *United States*, 350 F.Supp. 1397 (1972) cited by counsel, the court held that oceanographic research vessels are not vessels engaged in the foreign or coastwise trade, nor are they so intended; therefore, foreign repairs on such vessels are outside the scope of 19 U.S.C. 1466. The *Green Valley* and its *Lash* barges are not oceanographic vessels, and although they were to be used in military operations, they are U.S.–documented vessels which were intended to be used in foreign trade before the commencement of the MSC time charter and after its expiration.

Counsel states that the courts have held that while "the basic purpose of the foreign repair statute was to protect American labor", Congress meant "to encourage U.S. shipowners to employ U.S. labor [only] (sic) *whenever possible* (sic)" (See *Sea-Land Service, Inc.* v. *U.S. supra,* at p. 1409; *Mount Washington Tanker Co.* v. *United States,* 69 CCPA 23, 28, 665 F.2d 340, 344 (1981)). Although it may not have been possible to have the work required pursuant to the MSC charter to be done in the U.S. and still meet the delivery dates in the Philippines, Congress did not intend the vessel repair statute to be inapplicable for purposes of commercial expediency. The applicant (Central Gulf) knew that substantial work had to be done to the vessels in the event the MSC charter was awarded to them. Central Gulf nonetheless made a conscious business decision to proceed with its overseas schedule knowing the duty ramifications.

In regard to counsel's submissions on behalf of Central Gulf, we are of the opinion that the letter of November 1, 1988, constitutes a timely submitted application in that it states a basis upon which relief is claimed (i.e., modifications). We note, however, that the applicable Customs Regulations (i.e., 19 CFR 4.14) contain no provision for an "Amended or Supplemental Application for Relief." Furthermore, in view of the fact that counsel's request for an extension of time was properly denied (Central Gulf had over four years to prepare the application and obtain the requisite supporting documentation), any materials submitted by or on behalf of Central Gulf regarding these vessel repair entries (including the Amended or Supplemental Applications for Relief) more than 60 days from the *Green Valley's* arrival in the U.S. (i.e., October 24, 1988) are submitted untimely and will not be considered.

In its application of the vessel repair statute (19 U.S.C. 1466), Customs has held that modifications/alterations/additions to the hull and fittings of a vessel are not subject to vessel repair duties. A leading case in the interpretation and application of section 1466 is *United States* v. *Admiral Oriental Line et al.,* T.D. 44359 (1930) where the Court considered the issue of whether steel swimming tanks installed on a U.S.–flag vessel in a foreign port constituted equipment or repairs within the meaning of section 1466. In holding that the installation of these tanks did not constitute either equipment or repairs and therefore was not dutiable, the Court in *Admiral Oriental* cited earlier court decisions which define equipment, promulgations by the Board of Naval Construction, and regulations of the Treasury Department, as well as opinions of the Attorney General.

Accordingly, for purposes of section 1466, dutiable equipment has been defined as:

> * * * portable articles necessary or appropriate for the navigation, operation, or maintenance of a vessel, but not permanently incorporated in or permanently attached to its hull or pro-

> pelling machinery, and not constituting consumable supplies. *Admiral Oriental, supra.*, (quoting T.D. 34150, (1914)).

By defining what articles are considered to be equipment, the authority cited above formulated criteria which distinguish those items deemed to be modifications/alterations/additions to the hull and fittings and therefore not dutiable under section 1466. These items include:

> * * * those applications which are permanently attached to the vessel, and which would remain on board were the vessel to be laid up for a long period * * * *Admiral Oriental, supra.*, (quoting 27 Op. Atty. Gen. 228.)

Furthermore, the Court in *Otte* v. *United States*, T.D. 36489 (1916) stated that before an item can be regarded as part of a vessel, it must be "essential to the successful operation" of the vessel.

It should be noted that in regard to claims for relief under the vessel repair statute the burden of proof is on the applicant to show nondutiability. Upon further review of the evidence submitted (i.e., those copies of invoices pertaining to the claim of relief set forth in the November 1, 1988, application which, it should be noted, are of poor quality with descriptive words marked out and duplicate page and item numbers) we find the following work to be modifications/alterations/additions to the vessel or otherwise nondutiable charges:

EXHIBIT 1

Hyundai Mipo Dockyard Co., Ltd. Invoice No. 418521

Pages 1–3 General Services. (NOTE: There are 2 other pages in this invoice numbered 1 which also contain costs for General Services.)
Page H–4 Item No. 39. (H. 0490–00–13)—Only the transportation charges listed under this item are nondutiable.
Page H–4 Item No. 40. (H. 0720–00–20)—The work under this item constitutes a modification except for nos. 1, 6, 12, and 13.
Page H–8 Item No. 41 (H. 0540–00–13)—The work under this item constitutes a modification except for no. 4.
Page H–11 Item No. (H–0861–00–12)—Only the cost of staging under no. 2 of this item is nondutiable.
Page P–3 Item No. 43.—Only the costs of staging and a ladder under this item are nondutiable.
Page M–3 Item No. M.8130 Add'
Page M–3 Item No. 17 (M.8010)—This item is nondutiable except for nos. 7, 9, and 10.
Page M–6 Item No. 15 (M.1830)
Page M–6 Item No. 20 (M.8512)—This item is nondutiable except for nos. 3 and 4.
Page M–10 Item No. 41 (M.4014–00–12)—Only the cost of staging in no. 1 under this item is nondutiable.
Page 0–6 Item No. (T. 1539–00–10)—Only the cost of staging is nondutiable.
Page 0–6 Item No. (F.0830–00–20.)
Page 0–14 Item No. (F.3214–00–13.)
Page 0–16 Item No. (F.2225–00–17)—Only the cost of staging is nondutiable.
Page 0–22 Item No. (A.0711–00–14)—Only the cost of staging is nondutiable.
Page 0–30 Item No. (A.0711–00–16.)
Page E–6 Item No. (620001.)

(It should also be noted on this page that the spare parts handling fee and the Customs clearance fee is nondutiable.)
Page H–4 Item No. 70 (NOTE: This is the second of 2 pages numbered H–4.)
Page P–4 Item No. (0493) (NOTE: This is the second of 2 pages numbered P–4.)

EXHIBIT 2

Philippine Shipyard & Engineering Corp. Invoice No. 2042

Item No. 5500—Mooring and Unmooring.
Item No. 5000—Drydocking and Undocking.
Item No. 1000—General Services.
Item No. 1500(D)—Removed pad-eyes in way of cargo hold.
Item No. 1500(J)—Crane Services on removal of dunnages.

EXHIBIT 3

Philippine Shipyard & Engineering Corp. Invoices No. 2047–1

Item No. 1—Mooring and Unmooring.
Item No. 2—Laying and Inspection.
Item No. 3—Incidental Work.

EXHIBIT 4

Yung Cheng Engineering Works Invoice dated August 25, 1984

All of the work is dutiable with the exception of Item nos. 1–4, 6, 10, 15, 29, 31

EXHIBIT 5

Sumitomo Heavy Industries, Ltd. Work Completion Report dated September 26, 1984

T–1—Docking and General Service
T–6
T–7
T–8—(all of the work is nondutiable with the exception of Item no. 8)
T–10
T–12—(all of the work is nondutiable with the exception of Item no. 1 covering the purchase and installation of a washing machine and dryer)
T–13
T–25—(all of the work is nondutiable as part of a modification with the exception of item nos. 3, 5, and 7)
T–28—(only items 2, 4, and 5 are nondutiable)
T–31
T–33
T–34
T–2
T–3—(only Item nos. 5(1) and (2) under this item are nondutiable)
M–2
M–3
Item No. 1 on page E–1
Item No. 2 on page E–3
Item No. 3 on page E–6
Item No. 5 on page E–9
Item No. 6 on page E–10
Item No. 8 on page E–12

EXHIBIT 6

Philippine Shipyard and Engineering Corp. Invoice 2043(A)

General Services

Philippine Shipyard and Engineering Corp. Invoice 2043(C)

General Services—only items 2 (crane service) and 3 (tug service) are nondutiable

Philippine Shipyard and Engineering Corp. Invoice 2043(D)

Item 3E01—Shore electric power connection
Item 2000—Temporary power cable
Item 3W01—Cable Tray Installation

Item 3501—Junction Box for Paceco Crane
Item 2LO2—Decontamination room light
Item 3W02—Cable Installation for Decontamination Rm. Blower Fan Motor
Item 3H02—9000 CFM Dehumidifier Heater
Item 3Z02—Dehumidifier Grounding Strap
Item 3W03—Washing Machine Circuit Braker Installation
Item 3W01—Cable Tray Installation Work
Item 3W02—Decontamination Room Blower
Item 3W03—Washing Machine and Dryer Cable Installation Work

EXHIBIT 7
General Electric Invoice no. 2973
The travel and living expenses listed are nondutiable

EXHIBIT 9
Dodwell Invoice no. IT 101243
Only the actual travel fee listed is dutiable

Kaigai Gijutsu K.K. Invoice No. T–7136
Only the actual travel fee and the travel hours are nondutiable

KBK Invoice dated Sept. 26, 1984
Only the travelling fee is nondutiable

Kanto Marine Service Co., Ltd. Bill No. NMC–371/83

Heiwa Kotsu Co., Ltd. Invoice dated October 12, 1984

Mitsubishi Warehouse & Transportation Co., Ltd. Bill No. GG–1053

EXHIBIT 11
A & H Ship Chandling/Gen. Services Invoice dated October 12, 1984
A & H Ship Chandling/Gen. Service Invoice dated October 24, 1984
(Both invoices of this date are nondutiable in their entirety)

A & H Ship Chandling/Gen. Service Invoice dated October 31, 1984

A & H Ship Chandling/Gen. Service Invoice dated November 13, 1984

EXHIBIT 12
The Shenton Medical Group Pte Ltd. Invoice No. SMG 984/038383

The Shenton Medical Group Pte Ltd. Invoice No. SMG 984/010983

PSA Bill No. BMJ 051

LIM & Sons Co., (PTE) Ltd. Bill No. OL/PP/CO54/84

LIM & Sons Co., (PTE) Bill No. OL/PP/055/84

Orient Lloyd PTE. LTD. MV No. 59546

Telecoms Bill dated September 21, 1984

EXHIBIT 13
Philippine Shipyard and Engineering Corp. dated October 18, 1984 PSEC Ref. No. 84–515

Philippine Shipyard and Engineering Corp. dated November 29, 1984 PSEC Ref. No. 84–568

EXHIBIT 14
A & H Ship Chandling/Gen. Services Invoice dated November 24, 1984
Only the truck delivery and handling expenses are nondutiable

EXHIBIT 15
Hyun Dai Marine Service Co., Ltd. Invoice dated September 7, 1984

EXHIBIT 16
Philippine Shipyard and Engineering Corp.
Invoice No. 2046–1 PSEC Ref. No. 84–485

Holding:

The foreign work noted in the November 1, 1988, application for which the applicant seeks relief is nondutiable as noted above.

(C.S.D. 89–126)

Drawback: U.S. Department of Agriculture standard grades for tobacco are determinative for fungibility issues (19 U.S.C. 1313(j)(2)).

Date: August 1, 1989
File: HQ 220974
CO:R:C:E 220974K
Category: Drawback (19 U.S.C. 1313(j)(2))

REGIONAL COMMISSIONER OF CUSTOMS
NEW YORK REGION
6 World Trade Center
New York, New York 10048–0945

Re: Fungibility of tobaccos for purposes of substitution same condition drawback (19 U.S.C. 1313(j)(2)).

DEAR SIR:

The ruling which follows was initiated by Customs Headquarters due to informal inquiries concerning the different treatment by regional drawback liquidation units as to the fungibility of tobaccos. The Tobacco Association of United States subsequently submitted a formal submission for a ruling on behalf of its members.

Facts:

Drawback entries were filed at the New York Region for the exportations of shipments of Flue-cured and Burley tobaccos that were substituted for importations of duty-paid shipments of Flue-cured and Burley tobaccos. It is the position of the Association that an import shipment and export shipment of Flue-cured tobaccos are fungible for purposes of the substitution same condition drawback law depending on their stalk position and on the basis of leaf for leaf, strip for strip, and scrap for scrap. The same criteria is set forth for Burley tobaccos. It is further the position of the Association that the primary function of the Official Standards of Grades of the United States Department of Agriculture (U.S.D.A.) for Flue-cured and Burley tobaccos is to serve as the basis for the U.S.D.A. tobacco price-support program, that they play no role in the commercial processing or sale of tobaccos, and, therefore, the standards

are not controlling in determining the fungibility requirement of the drawback law. We do not agree.

Issue:

The issue is whether the Official United States Standard Grades for Flue-cured and Burley tobaccos are determinative for fungibility issues concerning these tobaccos.

Law and Analysis:

The substitution same condition drawback law, 19 U.S.C. 1313(j)(2), requires that the merchandise substituted for exportation must be fungible with the duty-paid merchandise and in the same condition as was the imported merchandise at the time of its importation. Section 191.2(m) of the Customs Regulations defines the term "same kind and quality" as merchandise which may be substituted under substitution [manufacturing] drawback. Fungible merchandise is always same kind and quality merchandise; however, same kind and quality merchandise is not always fungible merchandise. Section 191.2(l) defines the term "fungible merchandise" as "merchandise which for commercial purposes is identical and interchangeable in all situations." Substituted merchandise used in a manufacturing process under 19 U.S.C. 1313(b) does not necessarily have to be identical with the imported designated merchandise. However, merchandise substituted under substitution same condition drawback, 19 U.S.C. 1313(j)(2), must be commercially identical with the imported designated merchandise in all situations.

In Treasury Decision 80–57 and Customs Service Decision 81–131, published prior to the enactment of the substitution same condition drawback law in 1984, the Customs Service gave notice that it would use the Official Standard Grades of the U.S. Department of Agriculture for Flue-cured and Burley tobaccos to determine same kind and quality determinations under substitution manufacturing drawback 19 U.S.C. 1313(b) on a grade for grade basis. Manufacturing drawback contracts concerning the substitution of tobaccos requiring approval by Headquarters under section 191.21 of the Customs Regulations have been consistently approved on the basis of the official standards for tobaccos.

The U.S.D.A. standards are based, in part, on the stalk position of the tobacco plants similar to the claim of the Association but include other considerations to determine quality such as, but not limited to, ripeness, oil content, color intensity, uniformity, and injury tolerance. For example, the Flue-cured Leaf (B) Group, 7 CFR 29.1162 is described as consisting of leaves *normally grown at or above the midportion of the stalk,* have a pointed tip, tend to fold, usually are heavier in body than the other groups, and show little or no ground injury. There are 63 grades in this group. Choice Quality Lemon Leaf, grade B1L is rich in oil, is deep in color intensity, has a uniformity of 90 percent and an injury tolerance of 5 percent as compared with a Poor Quality Lemon Leaf, grade B6L which is

lean in oil, is weak in color intensity, has a uniformity of 70 percent and an injury tolerance of 40 percent, of which not over 20 percent may be waste.

The position of the Association would require the Customs Service to ignore its own definition of the term "fungible merchandise" and consider two shipments of tobaccos which do not meet the official standards as "fungible" but not as of the same kind and quality. Thus, the stringent criteria for fungibility would be reversed and become more liberal than the criteria for same kind and quality. Further, some of the members of the Association that have claims pending at New York have approved drawback contracts under manufacturing drawback and it cannot be said that they were not aware of the Customs policy concerning the use of the U.S.D.A. standards of quality.

In responding to issue number three of Customs Service Decision 85–34, we stated that "Legal questions regarding fungibility and same condition will of course be decided by Customs Headquarters." Part 177 of the Customs Regulations provides the means for any person engaged in any transaction affected by the Customs laws, including the drawback laws, to obtain a binding ruling by the submission of a written request to Customs Headquarters. We note that the claimants and their representative failed to initiate a request for a binding ruling from Customs Headquarters concerning the issue of fungibility of tobaccos prior to filing entries for drawback.

The Declaration of purpose of the Tobacco Inspection Act of August 23, 1935 (7 U.S.C. 511a) is stated as follows:

> Transactions in tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest; such transactions are carried on by tobacco producers generally and by persons engaged in the business of buying and selling tobacco in commerce; the classification of tobacco according to type, grade, and other characteristics affects the prices received therefor by producers; without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein.

Section 213 of Public Law 98–180 (7 U.S.C. 511r), the Dairy and Tobacco Adjustment Act of 1983, amended The Tobacco Inspection Act of 1935, to require the U.S.D.A. to establish official standard grades for imported Flue-cured and Burley tobaccos, insofar as practicable, in the same manner as the tobaccos marketed through a warehouse in the United States are inspected for U.S.D.A. grade and quality. In the legislative history, the Congressional Conference

Committee noted "that approximately 95 percent of the tobacco marketed in the United States is inspected for grade and quality." (See 1983 U.S. Code Congressional and Administrative News, page 1763.) The Conference Committee stated the purpose for requiring inspection and grading of imported tobaccos as follows:

> * * * the conferees make clear that they intend that the system [inspection and grading of domestic and imported tobaccos] ensure the reliability and accuracy of information on tobacco trade collected for use by the Congress in overseeing the No Net Cost Tobacco Program and for enhancing the effectiveness of customs operations, including the "drawback" provisions, and other government activities relating to tobacco. (The quotation marks were in the original.)

The Department of Agriculture published a final rule in the Federal Register on April 20, 1984 (49FR16755) to include the inspection and grading system of imported Flue-cured and Burley tobaccos in the same manner as domestic tobaccos. In addition, the ruling included a system for grading of "strip" tobaccos and the pending claims concern strip tobaccos. Thus, prior to the effective date (November 14, 1984) of the substitution same condition drawback law, there was already in place the means of matching imports and exports of tobaccos on the basis of the U.S.D.A. standards and the publication of T.D. 80–57 and C.S.D. 81–131 by Customs was public notice of its policy to utilize the use of those standards in making determinations under the drawback laws.

All tobaccos sold at auction in the United States are graded and tagged by the U.S.D.A. prior to auction and as noted, the Congressional Conference Committee stated that 95 percent of domestic tobaccos are graded by the U.S.D.A. Buyers at the auctions are aware of the U.S.D.A. grade at the time of the purchase and it affects the selling price based on the quality of the tobaccos. We are satisfied that the Official Standard of Grades of the U.S.D.A. for Flue-cured and Burley tobaccos represent industry and commercial standards of quality and that they are determinative in fungibility issues for substitution same condition drawback.

Holding:

Two shipments of tobaccos that meet the Official United States Standard Grades For Flue-cured or Burley tobaccos (7 CFR Part 29, Subpart C), on a grade for grade basis, and on the basis of leaf for leaf or strip for strip, are fungible for purposes of substitution same condition drawback under 19 U.S.C. 1313(j)(2).

You are directed to deny pending claims that do not meet this criterion unless the claimants can substantiate compliance by filing timely amended claims.

(C.S.D. 89–127)

Valuation: Testing equipment is not an assist within the meaning of 402(h)(1)(A) of the TAA.

Date: May 30, 1989
File: HQ 544315
CLA–2 CO:R:C:V 544315 DHS
Category: Valuation

JOHN A. SLAGLE
WOLF D. BARTH CO. INC.
7575 Holstein Avenue
Philadelphia, Pennsylvania 19153

DEAR MR. SLAGLE:

This is in reference to your letter of February 28, 1989, inquiring as to the dutiability of certain test equipment pursuant to section 402(h)(1)(A) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. 1401a(h)(1)(A)).

Facts:

A U.S. company provides test equipment free of charge to foreign manufacturers to check the integrity of the finished instruments before shipment to the United States. There is no indication in your submission as to the method used to appraise the merchandise.

Issue:

Does test equipment fall within the definition of an assist pursuant to section 402(h)(1)(A) of the TAA?

Law and Analysis:

Section 402(h)(1)(A) provides as follows:

> The term assist means any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise:
>
> (i) Materials, components, parts, and similar items incorporated in the imported merchandise.
> (ii) Tools, dies, molds and similar items used in the production of the imported merchandise.
> (iii) Merchandise consumed in the production of the imported merchandise.
> (iv) Engineering, development, art work, design work, plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

In TAA No. 11, dated November 7, 1980 (HRL 542187), we held that testing costs incurred as a result of testing the accuracy of the design and structure of steel structures which were neither part of the design and engineering work, nor necessary for the fabrication

of the product by the U.S. purchaser to the foreign exporter were not assists within the meaning of section 402(h)(1)(A) of the TAA. However, in certain instances, payments made by the U.S. purchaser to the foreign exporter were considered to be part of "the price actually paid or payable" for the imported merchandise.

With respect to the instant case, it appears that the testing equipment is not used in the production of the imported merchandise within the meaning of section 402(h)(1)(A)(ii) of the TAA or the above cited case. Furthermore, the equipment does not fall within any of the other assist categories. We note in this regard that these categories are intended to be inclusive and, accordingly, items not included therein are not considered assists.

It should be noted that if the equipment is appraised under computed value the costs of the equipment may be included as the "cost or value of the materials and the fabrication and other processing of any kind employed in the production of the imported merchandise" or "an amount for profit and general expenses * * * made by the producers in the country of exportation for export to the United States." See, section 402(e)(1)(A) and (B) of the TAA. If, in accordance with generally accepted accounting principles of the country of production or exportation, the costs of this equipment should be reflected in the books of the foreign assembler as processing costs, then it may be that the costs are to be included in determining the computed value of the final imported product. See HRL No. 544083, dated Autust 16, 1988 and TAA No. 9, dated October 15, 1980 (HRL 542139).

Holding:

In view of the foregoing, we conclude that the testing equipment is not an assist within the meaning of 402(h)(1)(A) of the TAA. If the merchandise is to be appraised under computed value, the inclusion of these costs must be determined according to generally accepted accounting principles.

(C.S.D. 89–128)

Valuation: The applicability of partial duty exemption under HTSUSA subheading 9802.00.60 to certain stainless steel pipe and sheet processed in Europe.

Date: September 6, 1989
File: HQ 554965
CLA–2 CO:R:C:V 554965 GRV
Category: Classification
Tariff No.: 9802.00.60, HTSUS (formerly 806.30, TSUS)

MR. FERNANDO GOIRICELAYA
ALLOY & STAINLESS, INC.
370 Franklin Turnpike
P.O. Box 604
Manwah, New Jersey 07430–2224

Re: Applicability of partial duty exemption under HTSUS subheading 9802.00.60 to certain stainless steel pipe and sheet processed in Europe.

DEAR MR. GOIRICELAYA:

This is in response to your letter of March 4, 1988, to the U.S. Customs Service office in New York, requesting a ruling on the applicability of subheading 9802.00.60, Harmonized Tariff Schedule of the United States (HTSUS) (formerly item 806.30, Tariff Schedules of the United States (TSUS), to certain stainless steel pipe and sheet to be processed in Europe. Your letter has been referred to this office for a response.

Facts:

You state that stainless steel skelp (flat-rolled steel strip from which pipe or tubing is made) of U.S. origin will be exported to Spain and other European countries where it will be formed into pipe. The pipe will then be returned to the U.S. for further processing, either by beveling or threading the ends or by cutting to length in addition to beveling or threading.

You also state that you plan to export stainless steel sheet of U.S. origin in coil form, presumably to the same foreign manufacturers, to be slit and cut. The steel sheet will then be returned to the U.S. and warehoused, for up to four months, until customers' orders are received, at which time it will be further processed by cutting the sheets to specific sizes, according to customers' requirements, polishing the sheets and smoothing or rounding the corners.

Issue:

Whether the stainless steel pipe and sheet will be eligible for the partial duty exemption provided for under HTSUS subheading 9802.00.80 (formerly item 806.30, Tariff Schedules of the United States (TSUS)) when returned to the U.S.

Law and Analysis:

Effective January 1, 1989, the Harmonized Tariff Schedule of the United States (HTSUS) superseded and replaced the Tariff Schedules of the United States (TSUS). TSUS item 806.30 was carried over into the HTSUS without change as subheading 9802.00.60. This tariff provision provides a partial duty exemption for:

> [a]ny article of metal (except precious metal) manufactured in the United States or subjected to a process of manufacture in the United States, if exported for further processing, and if the exported article as processed outside the United States, or the article which results from the processing outside the United States, is returned to the United States for further processing.

HTSUS subheading 9802.00.60 imposes a dual "further processing" requirement on metal articles—one must be accomplished in the foreign country to which the metal is exported and one must be accomplished in the U.S. when the metal is returned. Metal articles

satisfying these statutory requirements may be classified under HTSUS subheading 9802.00.60 with duty only on the value of such processing done outside the U.S., upon compliance with section 10.9, Customs Regulations (19 CFR 10.9, copy enclosed).

In C.S.D. 84–49, 18 Cust. Bull. 957 (1983) we held that:

> [f]or purposes of item 806.30, TSUS, the term 'further processing' has reference to processing that changes the shape of the metal or imparts new and different characteristics which become an integral part of the metal itself and which did not exist in the metal before processing; thus, further processing includes machining, grinding, drilling, threading, punching, forming, plating, and the like, but does not include painting or the mere assembly of finished parts by bolting, welding, etc.

In Headquarters Ruling Letter 554245 (September 30, 1986) flat rolled steel was exported to be formed into stainless steel pipe and tubing, and was further processed on return to the U.S. by cutting, threading, bending to shape, and coating with resins or fibers. We stated that the foreign process of fabricating steel strip into pipe and tubing was sufficient to meet the foreign processing requirement of TSUS 806.30 (now HTSUS subheading 9802.00.60). Further, we stated that cutting, threading, bending and forming the pipe to specific shape in the U.S. constituted sufficient treatment of the metal to comply with the domestic processing aspect of the provision. Accordingly, we held that the metal articles would be eligible for TSUS item 806.30 treatment when returned to the U.S.

We have also held that slitting operations constitute further-processing for purposes of TSUS item 806.30. See Headquarters Ruling Letters 553950 (December 23, 1985) and 063601 (April 18, 1980).

In the present case, the forming of pipe from stainless steel skelp and the slitting and cutting of stainless steel sheet abroad are manufacturing processes sufficient to change the shape of the metal and qualify the exported metal under the foreign processing aspect of the provision. Similarly, the beveling or threading of pipe and the further cutting of steel sheet to size constitute manufacturing processes sufficient to change the shape of the metal and qualify the imported metal under the domestic processing aspect of the provision. Accordingly, provided the documentary requirements of 19 CFR 10.9 are met, the metal articles will be eligible for HTSUS subheading 9802.00.60 treatment when returned to the U.S.

As regards the warehousing of the returned stainless steel sheet for periods of up to four months before it is further processed to meet customers' requirements, in Headquarters Ruling Letter 037347 (July 14, 1975) we stated that returned articles may be held in stock for a reasonable time before being subjected to further domestic processing operations, provided a realistic expectation of customer demand for the final product exists. We further stated that the importer should satisfy the district director of the actual performance of further processing withnin the time frame specified

before the applicable entry may be liquidated under TSUS item 806.30. Under the circumstances of the instant case, it is our opinion that the warehousing of the stainless steel sheet for up to four months before it is further processed in the U.S. would constitute a reasonable period of time and would not preclude HTSUS subheading 9802.00.60 treatment for the returned sheet.

Regarding export certificates for the metal products returned to the U.S., although the products may be subject to voluntary restraint agreements (VRAs) the U.S. has with Spain and other European countries, the articles may be entered under HTSUS subheading 9802.00.60 without an export certificate, provided all requirements for entry under that subheading are met.

Conclusion:

On the basis of the described manufacturing processes, the stainless steel pipe and sheet will be eligible for the partial duty exemption under HTSUS subheading 9802.00.60 when returned to the U.S., provided the documentary requirements of 19 CFR 10.9 are met and the domestic processing of the returned stainless steel sheet occurs within the reasonable time following its placement in a domestic warehouse.

(C.S.D. 89–129)

Valuation: The GSP eligibility of control transformers.

Date: September 6, 1989
File: HQ 555420
CLA–2 CO:R:CV:V 555420 BJO
Category: Classification

DISTRICT DIRECTOR OF CUSTOMS
P.O. Box 9516
El Paso, Texas 79985

Re: Request for internal advice regarding GSP eligibility of control transformers imported from Mexico.

DEAR SIR:

This is in response to your memorandum of August 31, 1988 (CLA 1–01:EP:C:C RM), forwarding the internal advice request Rudolph Miles & Sons, Incorporated, submitted on behalf of Westinghouse Electric Corporation, Small Power Transformer Division ("importer"). The importer asks that you seek our advice concerning the eligibility of certain control transformers for duty-free treatment under the Generalized System of Preferences (GSP) (19 U.S.C. 2461–2466).

Facts:

The control transformers are produced in Mexico by the importer's subsidiary from U.S. materials. Although the importer makes a number of different control transformer models at its Mexican facility, the importer states that the production process for each is generally as follows:

1. *Lead Manufacturing and Assembly.* Coils or reels of U.S. origin insulated copper wire of different size combinations are cut to length with Eubank and Artos equipment, and joined by brazing or projection spot welding. The insulation from the ends of the cut cable is stripped, and the cables are marked.

2. *Insulation Cutting.* Insulation materials of paper, mylar, and nomex, imported from the U.S. in stock dimensional rolls, are cut to required length and width with manual or mechanical sheeters and cutters.

3. *Terminal Board Assembly.* U.S. origin electrical terminal connectors, or posts, are either stapled, staked, riveted, or bolted to U.S. boards made of various insulating materials, some of which require modification in accordance with engineering drawings. The boards are stamped with necessary symbols and their edges are sanded. The cable lead assemblies (step 1 above) are then mounted to the assembled terminal connector, apparently by winding the stripped end of the cable around the post and welding it into place.

4. *Bobbin Fabrication.* Coil bobbins, around which insulation and wire will be wound, are then made. They are produced by cutting U.S. origin paper tubes with band saws to the required length. Fiberboard flanges are cut from U.S. fiberboard sheets. The flanges are cemented to the cut paper tubes to form the bobbin, and edge burrs are removed using hand files. The finished bobbin with flanges is similar in appearance to a spool around which thread is wound.

5. *Coil Winding and Inductor Fabrication.* The inductor coil is then produced by winding U.S. origin copper magnet wire, strip, or aluminum foil around the bobbin, interleaving insulation materials, and welding or brazing lead assemblies at specific points on the coils. In some instances, the materials are wound on a large bobbin, which is then cut into smaller, individual coils. Operator control of tension, proper location of insulation and leads requires "strict observance of precise and exacting tolerances." The coils are then electronically ratio tested. When the winding operation is completed, the final lead assemblies are welded, crimped, or soldered, and taping is placed around the entire inductor. At this point, the importer states that the completed inductor coil may be put into inventory as a discrete item, and may be shipped as a replacement part, or may be processed directly into a control transformer.

6. *Core and Inductor Assembly.* Control transformers are then produced using two or more inductor coils and U.S. origin C-cores or pre-cut lamination. With the use of hand tools, gauges, special jigs, and fixtures, a primary inductor coil is placed on

one leg of a one-piece C-core and a secondary coil on the other leg, or, if laminations are used, the E-shaped lamination segments are stacked in the coils by machine, with the final segments inserted by hand. The coils and C-cores or laminations are secured together with an external mounting frame, and the completed items undergo preliminary electrical testing.

7. *Electrical Testing.* The completed control transformer undergoes final electrical testing of turn count, AW and TW tests (wattage), high potential testing, and ratio and continuity testing. The leads are then cleaned, and the transformer is painted.

Issue:

Whether an inductor coil which is produced from U.S. materials and assembled in Mexico into a control transformer, is a substantially transformed constituent material of the control transformer for GSP purposes.

Law and Analysis:

Under the GSP, eligible articles which are imported directly into the customs territory of the U.S. from a designated developing beneficiary country (BDC) may receive duty-free treatment if the sum of 1) the cost or value of materials produced in the BDC, plus 2) the direct costs of the processing operation in the BDC, is equivalent to at least 35% of the appraised value of the article at the time of entry. *See* 19 U.S.C. 2463(b).

If an article if produced or assembled from materials which are imported into the BDC, the cost or value of those materials may be counted toward the 35% value-content minimum only if they undergo a double substantial transformation in the BDC. *See* 19 CFR 10.177. That is, the cost or value of the imported U.S. materials used to produce the control transformers may be included in the GSP 35% value-content computation only if they are first substantially transformed into a new and different article of commerce, which is itself substantially transformed into the finished product.

A substantial transformation occurs "when an article emerges from a manufacturing process with a name, character, or use which differs from those of the original material subjected to the process." *See The Torrington Co.,* v. *United States,* 764 F.2d 1563, 1568 (Fed. Cir. 1985), *citing Texas Instruments Incorporated* v. *United States,* 681 F.2d 778, 782 (CCPA 1982).

The inductor coils produced in Mexico clearly have a name, character, and use different than their component materials. Until the coil bobbin is formed, the copper wire stripped and would around the bobbin, the insulation materials cut and interleaved with the copper coilings, and the various leads attached at the appropriate points on the coilings, the U.S. materials clearly cannot function as an inductor coil, do not have the shape or form of an inductor coil, and are not known and cannot be classified for tariff purposes as an inductor coil. The U.S. materials have therefore been substantially

transformed into an inductor coil. *See* HQ 051102, dated July 23, 1977 (winding wire on torroidal coil and coating with protective polyurethane paint constitutes a substantial transformation). In light of the importer's claim that the inductor coils are put into inventory as discrete items and may be shipped for use as replacement parts in the control transformers, they may further be considered "articles *of commerce*" for GSP purposes. *See Azteca Milling Co.* v. *United States*, 12 CIT, 703 F. Supp. 949 (1988).

A second substantial transformation occurs as a result of the assembly of the inductor coils with other materials to create a control transformer. An inductor coil is a conductor used to introduce inductance into a circuit, and may be used, for example, as a choke, to impede the flow of alternating current (the importer states that although the inductor here is configured for use in the manufacture of transformers, it possesses the general electrical and physical characteristics of inductors). A transformer is used to convert a current or voltage from one magnitude to another, or from one type to another. An inductor by itself cannot perform this function, but must be joined by the C-core or E-lamination and a frame with another coil with the requisite number of windings, enclosed in an external housing, and attached with lead assemblies. Accordingly, as a result of the assembly, a new and different article of commerce with a new name, character, and distinct electrical function is created.

In C.S.D. 85–25, dated September 25, 1984 (HQ 071827), we stated that while "complex or meaningful" assembly operations may result in substantially transformed constituent materials, "minimal, simple, assembly-type operations" ordinarily will not. We do not believe that the production of the inductor coils, and the assembly of the control transformer from the coils, are the simple, assembly-type operation C.S.D. 85–25 was meant to preclude. That ruling distinguished operations which involve only the simple joining or combining of prefabricated components from operations which require the further manufacture of materials prior to assembly. The operations here appear to fall in that latter category, for, prior to assembly, the inductor coil's components must be formed out of the imported materials: the paper and fiberboard materials must be cut and shaped to form coil bobbins and flanges, copper wire must be cut to exact tolerances and joined by welding or brazing, insulation materials must be cut to the required dimensions, and lead assemblies must be formed. In addition, in C.S.D. 85–25, we determined that an assembly operation was "complex and meaningful" in light of

> "[the] very large number of components and a significant number of different operations [which require] a relatively significant period of time as well as skill, attention to detail, and quality control, and [result] in significant economic benefit to the beneficiary developing country from the standpoint of both

the value added [to the assembled article] and the overall employment generated thereby."

The cost information provided by the importer indicates that the value added through the Mexico assembly operation is significant, and that the processing time required for each model is substantial. *Cf.* C.S.D. 85–25 (processing time for each article approximately 20 minutes, and value added in connection with the assembly process approximately 10% of the overall cost of the article). Although the assembly operation does not involve the large number of components as that at issue in C.S.D. 85–25, the importer's submission does indicate that assembly of the inductor coils and transformer requires attention to detail and quality control, and that numerous tests are required in the course of the assembly to ensure that each step is properly performed. *Cf.* 19 CFR 10.195(a)(2)(ii)(D) (A simple combining or packaging operation for purposes of the Caribbean Basin Economic Recovery Act does not include simple combining or packaging coupled with any other type of processing such as testing or fabrication). For these reasons, and in light of the creation of a distinct intermediate article of commerce with a distinct electrical function, we find that the inductor coil is a substantially transformed constituent material of the control transformers.

Conclusion:

The inductor coil produced as described above is a substantially transformed constituent material of the control transformers. Therefore, the cost or value of the inductor coil may be included as a constituent material cost of the control transformer for purposes of the 35% value-content requirement of the GSP.

(C.S.D. 89–130)

Marking: Country of origin marking of aluminum bowls.

Date: September 1, 1989
File: HQ 731617
MAR 2–05 CO:R:C:V 731617 LR
Category: Marking

S. RICHARD SHOSTAK, ESQ.
STEIN, SHOSTAK & O'HARA
3580 Wilshire Boulevard
Los Angeles, California 90010–2597

Re: Country of origin marking of aluminum bowls.

DEAR MR. SHOSTAK:

This is in response to your letter dated July 21, 1988, submitted on behalf of your client, Nambe' Mills, requesting reconsideration of Headquarters Ruling Letter 730287, dated October 23, 1987. We regret the delay in responding.

Facts:

The articles to be imported are alloy aluminum trays and bowls which will be crafted and sandcast in the U.S. using alloy aluminum. After inspection and removal of burrs and other excess materials, the articles will be sent to Mexico where they will be ground and polished and then returned to the U.S. Representative sample bowls in the condition before and after the Mexican processing were submitted. The processing costs of the representative samples for the U.S. and Mexican operations are about $2.07 and $1.27, respectively.

In the original submission of March 9, 1987, you requested a ruling that the aluminumware is not subject to the marking requirements of 19 U.S.C. 1304 or, alternatively, that it be excepted from the marking requirements under section 134.32(m), Customs Regulations. The request was based on your contention that the processing performed in Mexico did not substantially transform the aluminumware into articles of Mexican origin.

In response to your request, Customs issued HQ 730287 on October 23, 1987, which held that the merchandise in question *was* subject to marking under 19 U.S.C. 1304 because it had been advanced in value or improved in condition abroad under Schedule 8, Part 1, Headnote 2, Tariff Schedules of the United States. The ruling discussed neither the relevance of the substantial transformation standard traditionally used by Customs in ascertaining the applicability of 19 U.S.C. 1304, nor whether a substantial transformation had, in fact, occurred.

You request reconsideration of that ruling based on HQ 729519, dated May 18, 1988, involving the marking requirements of certain wine coolers manufactured partly in the U.S. and partly in Canada. In that case, Customs specifically determined that substantial transformation was the proper test to apply in determining whether U.S. goods exported and returned are subject to the requirements of 19 U.S.C. 1304.

You believe that the substantial transformation standard was correctly applied in HQ 729519 and should also be applied to determine whether your client's merchandise is subject to the marking requirements of 19 U.S.C. 1304.

Issue:

Whether aluminum bowls and trays which are crafted and sandcast in the U.S., and exported to Mexico, where they are further processed by grinding and polishing, must be marked as products of Mexico upon their re-importation into the U.S.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), generally requires that all articles *of foreign origin* imported into the U.S. must be legibly, permanently and conspicuously marked to indicate the name of the country of origin to the ultimate purchaser in the U.S. The regulations implementing the country of origin marking requirements and exceptions of 19 U.S.C. 1304 are set forth in Part 134, Customs Regulations (19 CFR Part 134). Articles of U.S. origin are not subject to the requirements of 19 U.S.C. 1304 because they are not "articles of foreign origin." See HQ 729519, dated May 18, 1988, for discussion. Additionally, section 134.32(m), Customs Regulations, specifically excepts from marking U.S. articles exported and returned.

Customs has repeatedly ruled that, except as provided in section 10.22, Customs Regulations, products of the U.S. which are sent abroad for further processing, are not subject to country of origin marking upon re-importation of the article into the U.S. provided the further processing in the foreign country does not constitute a substantial transformation. Absent substantial transformation, the article is not "of foreign origin" and is not subject to the requirements of 19 U.S.C. 1304. Alternatively, the article is excepted from marking under 19 CFR 134.32(m) as a U.S. product exported and returned. *See e.g.,* HQ 732480, July 31, 1989; HQ 731652, February 16, 1989; HQ 729308, August 12, 1988; HQ 729519, May 18, 1988; C.S.D. 80–15, June 25, 1979; and, C.S.D. 79–443, January 25, 1979. A determination that an article has been advanced in value or improved in condition abroad under Schedule 8, Part 1, Headnote 2, Tariff Schedules of the United States, has no bearing on whether the article is subject to the requirements of 19 U.S.C. 1304. Since HQ 730287 did not consider whether the processing performed in Mexico constitutes a substantial transformation, the decision was improperly decided.

Applying the substantial transformation standard to the facts of this case, we find that the Mexican grinding and polishing operations do not substantially transform the aluminumware into articles of Mexico origin. In order for a substantial transformation to be found, an article having a new name, character or use must emerge from the processing. *See United States* v. *Gibson-Thomsen Co. Inc.,* 27 C.C.P.A. 267, C.A.D. 98 (1940). In addition, factors such as complexity and cost of the processing operations and whether the essence of the article has been changed, have also been considered. *See Uniroyal Inc.* v. *United States,* 3 C.I.T. 220, 542 F. Supp. 1026 (1982), aff'd, 702 F.2d 1022 (Fed. Cir. 1983).

Customs has previously ruled that grinding and polishing are finishing operations which render a product ready for use but do not substantially transform it into a product with a new name, character or use. For example, in T.D. 74–12(3), November 1, 1973, Customs ruled that socket blanks from Japan further processed in the

U.S. by grinding, polishing and other processing were not substantially transformed. In C.S.D. 80–15, Customs determined that forged stainless steel instruments of U.S. origin which were further processed in Pakistan by polishing, and other processing, were not substantially transformed into products of Pakistan. However, if the grinding and polishing operations are accompanied by another highly skilled operation, such as hand-cutting, a substantial transformation may occur. *See* Treasury Department Memorandum dated May 21, 1986, overturning HQ 728579 (crystal blanks which are mouth blown and hand cut in Czechoslovakia are substantially transformed in Ireland by grinding, polishing and additional hand-cutting; the latter being a highly skilled operation. The processing performed in Ireland was said to nearly double the value of the product).

In the present case, neither the grinding nor the polishing that is performed in Mexico changes the fundamental character or use of the product. It is the constituent material, aluminum alloy, coupled with the shape and design of the article created by the U.S. sand-casting process, that imparts the essential character to the finished product and determines its ultimate use. We note that while the finished product which has been ground and polished is more aesthetically pleasing than the unfinished product, the underlying decorative shape and design of the product is unaffected by the Mexican processing which merely renders the products ready to use. In addition, the name of the product *i.e.,* alloy aluminum bowl or tray, is not changed as a result of the processing performed in Mexico. Only the modifier (unfinished vs. finished) is affected.

Finally, the cost of processing in Mexico is significantly less than the cost of the U.S. processing and, unlike the highly skilled hand-cutting operation which accompanied the grinding and polishing in the crystal case, the only operations that are performed on the U.S. made aluminumware are grinding and polishing, neither or which appear to require significant skill.

Holding:

The aluminumware manufactured in the U.S. by casting and exported to Mexico for grinding and polishing is not subject to the requirements of 19 U.S.C. 1304 upon its return to the U.S. because the Mexican processing does not constitute a substantial transformation. HQ 730287 is overruled.

(C.S.D. 89–131)

Marking: Clarification of notice requirements of 19 CFR 134.25(d).

Date: September 6, 1989
File: HQ 731925
MAR 2–05 CO:R:C:V 731925 LR
Category: Marking

MR. RICHARD J. SULLIVAN
ASSOCIATION OF FOOD INDUSTRIES, INC.
177 Main Street
Matawan, New Jersey 07747

DEAR MR. SULLIVAN:

This is in response to your letter dated August 8, 1988, requesting reconsideration of your position expressed in Headquarters Ruling Letter 729939, dated June 10, 1988, regarding the type of notice to a subsequent purchaser or repacker required under section 134.25(d), Customs Regulations (19 CFR 134.25(d)). We regret the delay in responding.

Facts:

An importer of bulk food products sells such products to another party for further processing and repacking. The proposed language on the invoice to notify the purchaser of the country of origin marking requirements is as follows:

> If a company repacks imported bulk products without processing it further and substantially transforming it, country of origin labeling is required. See 19 CFR Part 134.

Issue:

Whether the proposed language satisfies the notice requirements of 19 CFR 134. 25(d).

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304) requires, subject to specified exceptions, that every article of foreign origin imported into the U.S. shall be marked to indicate the country of origin to the ultimate purchaser in the U.S. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. An ultimate purchaser is defined in 19 CFR 134.1 as "the last person in the U.S. who will receive the articles in the form in which it was imported."

Articles which are incapable of being marked and articles on the so called- J-list are excepted from individual marking pursuant to 19 U.S.C. 1304(a)(3)(A) and (J), respectively. However, the outermost container in which the article ordinarily reaches the ultimate purchaser is required to be marked to indicate the origin of its contents. See 19 U.S.C. 1304(b), 19 CFR 134.33 and 19 CFR 134.22(a).

If an imported J-list article or other article incapable of being marked will be repacked prior to sale to the ultimate purchaser, the importer must certify to Customs that he will properly mark the new package and/or notify the repacker of the obligation to mark the new package. See 19 CFR 134.25(a). When the article is sold or transferred to a subsequent purchaser or repacker, the following notice is required by 19 CFR 134.25(d):

NOTICE TO SUBSEQUENT PURCHASER OR REPACKER

> These article are imported. The requirements of 19 U.S.C. 1304 and 19 CFR Part 134 provide that the articles or their containers must be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article or container will permit, in such a manner as to indicate to an ultimate purchaser in the United States, the English name of the country of origin of the article.

The certification and notice procedures of 19 CFR 134.25 were established to ensure that the ultimate purchaser is advised of the country of origin of imported bulk products, despite an intervening repacking operation. If, however, the repacker substantially transforms the imported article prior to repacking, the manufacturer/repacker is the ultimate purchaser and no further marking is required. See 19 CFR 134.35.

In HQ 729939, June 10, 1988, Customs found that the proposed language was unacceptable because it "introduces concepts beyond the notice to subsequent purchaser or repacker required by the regulations, e.g., substantial transformation, and therefore could be confusing or misleading to such party."

Upon reconsideration of the matter we find that it is not confusing or misleading to refer to the substantial transformation concept in the notice to subsequent purchasers because it is directly relevant to the question of whether the new package must be marked with the country of origin. However, since the repacker may be unfamiliar with the substantial transformation issue, if the proposed language is included, the notice must also advise the subsequent purchaser or repacker to consult with Customs to ascertain whether or not the processing to be performed will result in a substantial transformation. In addition, since the repacker may also be unfamiliar with the general country of origin marking requirements of 19 U.S.C. 1304, the notice must also include the information in the sample notice set forth in 19 CFR 134.25(d).

Holding:

The notice to subsequent purchaser or repacker required by 19 CFR 134.25(d) may include the proposed language so long as it also advises the subsequent purchaser to consult with Customs on the issue of substantial transformation and includes the additional information set forth in the sample notice provided in 19 CFR 134.25(d).

(C.S.D. 89–132)

Marking: Country of origin marking of canned crab meat.

Date: August 16, 1989
File: HQ 732337
MAR 2–05 CO:R:C:V 732337 LR
Category: Marking

DISTRICT DIRECTOR OF CUSTOMS
Charleston, South Carolina

Re: Country of origin marking of canned crab meat.

DEAR SIR:

This is in response to the April 19, 1989, memorandum from the Assistant Special Agent in Charge requesting a ruling on the country of origin marking requirements of imported crab meat which is processed in the U.S. We have also considered the information submitted directly by Golden Harbor Seafood, Inc. and the National Blue Crab Association.

Facts:

Crabs are caught in China where they are cooked, chilled and the meat is extracted. The extracted crab meat is packed in plastic bags, frozen in blocks and boxed for shipment to the U.S. Upon arrival in the U.S., the crab meat is placed in a freezer and is thawed as it is needed to fill orders. The thawed crab meat is placed on a conveyor belt for inspection and *sorting* according to the size of the muscle fibers. The segregated meats are inspected a second time for the removal of any extraneous material. After the second inspection, similar sized domestic and foreign crab meats are *blended* small with small, medium with medium, large with large, and claw with claw. The blend generally consists of approximately 20% domestic and 80% foreign crab meat. The blended crab meat is *packed* in 8 ounce cans and is then subjected to a *pasteurization* process involving a substantial heat treatment followed by chilling at 35 degrees F. The cans of crab meat are rinsed and labeled.

Issue:

For purposes of 19 U.S.C. 1304, whether crab meat which has been extracted from the shell and imported into the U.S. in frozen blocks, is substantially transformed when it is processed in the U.S. by thawing, sorting by size and to remove extraneous material, blending with domestic crab meat, packing in cans and pasteurization.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that, unless excepted, every article of foreign origin, or its container, must be legibly, permanently, and conspicuously marked to indicate the country of origin to an ultimate purchaser in the

U.S. The primary purpose of the country of origin marking statute is to "mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States* v. *Friedlaender & Co.*, 27 C.C.P.A. 297, 302, C.A.D. 104 (1940) (quoted in *Globemaster, Inc.* v. *United States*, 68 Cust. Ct. 77, 79–80, 340 F. Supp. 975–76 (1972) and *National Juice Products Association* v. *United States*, 10 CIT 48, 628 F. Supp. 978 (1986).

The regulations implementing the requirements and exceptions to 19 U.S.C. 1304 are set forth in Part 134, Customs Regulations (19 CFR Part 134). Under 19 CFR 134.1(d), the ultimate purchaser is defined as the last person in the U.S. who will receive the article in the form in which it was imported. If an imported article is further manufactured in the U.S. and the manufacturing process is merely a minor one which leaves the identity of the imported article intact, pursuant to 19 CFR 134.1(d)(2), the consumer or user of the article who obtains the article after the processing, will be regarded as the ultimate purchaser.

Foreign natural products (such as crab meat) are on the so-called "J-list" and are excepted from individual marking requirements pursuant to 19 U.S.C. 1304(a)(3)(J) and 19 CFR 134.33. However, the outermost container inwhich the article ordinarily reaches the ultimate purchaser is required to be marked to indicate the origin of its contents. As provided in 19 CFR 134.25, if the imported J-list product will be repacked prior to sale to the ultimate purchaser, the importer must certify to Customs that he will properly mark the new package or alternatively, notify the repacker of the obligation to mark the new package. The certification procedures, which are for the purpose of ensuring that the ultimate purchaser will be advised of the country of origin, apply to imported J-list articles processed and repacked after importation unless the articles are substantially transformed prior to repacking. Absent a substantial transformation, the consumer or other recipient of the crab meat is considered the ultimate purchaser and must be advised of its country of origin.

Whether a substantial transformation has occurred depends upon a comparison of the article *before* the processing which is claimed to effect such transformation and the article *after* the processing. It is a well-settled principle of customs law that in order for a substantial transformation to be found, an article having a new name, character or use must emerge from the processing. *See United States* v. *Gibson-Thomsen Co. Inc.*, 27 C.C.P.A. 267, C.A.D. 98 (1940).

Although neither the courts nor Customs has specifically ruled on the country of origin marking requirements of imported crab meat which is further processed in the U.S., two court decisions involving the country of origin marking requirements applicable to imported food products, one on orange juice and another on fish, and two recent Customs decisions regarding imported shrimp are instructive.

In *National Juice Products, supra,* the Court of International Trade considered the effects, for purposes of marking, of domestic processing of foreign orange juice concentrate. The court upheld Customs determination in HQ 728557, September 4, 1985, published as C.S.D. 85–47, that the imported orange juice concentrate is not substantially transformed when it is mixed with other batches of concentrate, either foreign or domestic, water, orange essences, orange oil and in some cases, fresh juice and either packaged in cans and frozen or pasteurized, chilled and packed in liquid form. Customs found, and the court agreed, that the domestic processing did not produce an article with a new name, character or use because the essential character of the final product was imparted by the imported concentrate and not the domestic processing. The court stated that "the retail product in this case is essentially the juice concentrate derived in substantial part from foreign grown, harvested and processed oranges. The addition of water, orange essences and oils to the concentrate, while making it suitable for retail sale does not change the fundamental character of the product, it is still essentially the product of the juice of oranges." Therefore, the repacked orange juice products had to be marked with the country of origin of the imported concentrate.

In *Koru North America* v. *United States,* Slip Op. 88–162, Court of International Trade, decided November 23, 1988, the court considered whether the processing of headed and gutted fish in South Korea by thawing, skinning, boning, trimming, freezing and packaging, changed the name, character or use of the fish so as to effect a substantial transformation and render Korea the country of origin for purposes of 19 U.S.C. 1304. The court concluded that the processing performed in Korea constituted a substantial transformation because it changed the name of the article from "headed and gutted fish" to "individually quick-frozen fillets" and more importantly, because it vastly changed the fish's character. In this regard, the court noted that while the fish arrive in Korea with the look of a whole fish, when they leave they no longer possess the essential shape of the fish. The court also noted that the fillets are considered discrete commercial goods which are sold in separate areas and markets. The fact that the products also have different tariff classifications was found to be additional evidence of substantial transformation.

Based on the rationale of *National Juice Products, supra,* Customs determined in HQ 731472, June 23, 1988, published as C.S.D. 88–10, that the peeling and deveining of shrimp in the U.S. does *not* change the name, character or use of the imported product and thus, does not constitute a substantial transformation. In this regard, Customs stated that "the quality and size of the product is attributable to the imported product and not the domestic processing. While the peeling and deveining changes the physical appearance of the shrimp to a certain degree and renders the product ready for

eating, in our opinion the change is minor and does not fundamentally change the character of the imported product. We believe that in this case the imported shrimp similarly imparts the essential character to the final product."

More recently, Customs applied the same rationale in determining that imported shrimp which is peeled, deveined and cooked in the U.S. is not substantially transformed (HQ 731763, May 17, 1989). Customs found that these processing operations are minor ones which leave the identity of the imported shrimp intact and likened the cooking process to other processes which had previously been determined not to result in substantial transformation, *i.e.*, blanching of broccoli (HQ 729365, June 2, 1985, published as C.S.D. 86–26), roasting of pistachio nuts (T.D. 85–158, June 2, 1985) and smoking of salmon (HQ 729256, May 23, 1988).

The crab meat which is the subject of this inquiry is processed by thawing, sorting by size and to remove extraneous matter, blending with domestic crab meat, packing in cans, and pasteurization. For the reasons indicated below, we conclude that none of these operations taken individually or together is sufficient to substantially transform the crab meat into a product with a different name, character or use.

First, Customs had consistently ruled that neither the thawing nor freezing of a product substantially transforms it. For example, in the shrimp rulings, the product was imported in a frozen condition, and was thawed, processed and frozen in the U.S. In the broccoli ruling, the product was imported in a fresh condition and was processed and frozen in the U.S. In *National Juice*, the concentrate was imported in a frozen condition and was thawed, processed, and in some cases, frozen in the U.S. In each case, no substantial transformation was found because any change resulting from thawing and/or freezing was deemed insignificant.

Customs has also determined that sorting a product according to size or to remove extraneous matter is not a substantial transformation. *See* HQ 730058, June 2, 1987 (sorting of imported pecans to remove shell pieces and cutting to uniform size not a substantial transformation); C.S.D. 88–10 and HQ 731763, *supra* (sorting of shrimp by size not a substantial transformation); HQ 724640, July 2, 1984, published as C.S.D. 84–112, (filtration of honey to remove contaminants not a substantial transformation). Customs is of the opinion that the sorting process does not change the product in any material way.

Customs position on blending a product from one country with the same product of another country is that this process is a mere combining rather than a transforming. *See* C.S.D. 84–112, *supra* (blending of foreign honey with domestic honey not a substantial transformation); HQ 724872, March 1, 1984 (blending of Canadian maple syrup with domestic syrup not a substantial transformation); and *National Juice Products, supra*, (blending of imported orange

juice concentrate with domestic concentrate not a substantial transformation).

One of the two remaining processes to which the imported crab meat is subjected is pasteurization. This is a process which exposes the product to a high temperature in order to destroy certain microorganisms and prevent or arrest fermentation. Customs has ruled that this process and other similar processes (*e.g.*, flash heating and blanching) do not effect a substantial transformation because they maintain and preserve the characteristics of the imported product rather than change them. In C.S.D. 85–47, *supra*, upheld in *National Juice*, Customs ruled that orange juice concentrate which was pasteurized and otherwise processed in the U.S. was not substantially transformed. Although there was no separate discussion regarding pasteurization, Customs found, and the court agreed, that there was no fundamental change in the product as a result of the U.S. processing. In the honey ruling, Customs ruled that flash heating, another heating process which destroys yeast and prevents fermentation, does not constitute a substantial transformation (C.S.D. 84–112, *supra*). *See also* C.S.D. 86–26, *supra* (blanching vegetables, a process which prepares them for freezing whereby the vegetables are subjected to steam heat to partially cook and retard any deterioration of the vegetable from within, does not effect a substantial transformation).

The remaining domestic processing operation to be considered is packing the crab meat in cans. Two court decisions are relevant to this discussion. In *William Camp Co.* v. *United States*, T.D. 48623, 24 CCPA 142 (1936), the Court of Customs and Patent Appeals considered whether the marking "packed in Japan" was acceptable on canned salmon under § 304 of the Tariff Act of 1930. Although the decision indicates that the salmon was processed and packed in Japan, the particular facts are sketchy and there is no indication of what that processing involved. In this regard, the court indicates that the term "Packed in Japan" clearly implies that the fish were not only packed in cans in Japan, but were also prepared for ultimate consumption in that country and concludes that the marking was acceptable. We note, however, that while in some instances preparing a product for ultimate consumption will also substantially transform it (*e.g.*, the processing performed in *Koru, supra*), in other cases it will not (*e.g.*, the processing performed in *National Juice, supra*). Because the court did not indicate how the salmon was prepared for ultimate consumption, the case is not instructive on the issue of substantial transformation. It is clear that *William Camp Co.* does *not* stand for the proposition that canning alone is a substantial transformation.

In *National Juice*, some of the orange juice concentrate was similarly packed in cans before sale to the ultimate purchaser. Despite plaintiff's contention that cost of packing the product in cans played a significant role in preserving the retail product, the court

rejected plaintiff's argument that this cost was a factor in determining whether an article has undergone a substantial transformation.

There is also one Customs Headquarters information letter and an unpublished ruling on the issue of canning. In an information letter dated April 24, 1978, 709011, Customs informed the inquirer that "snails which are defrosted and canned in France would be considered a product of France, for purposes of 19 U.S.C. 1304, as canning is considered to result in a substantial transformation." No further details or discussion is included. In an unpublished ruling letter concerning the country of origin marking requirements for mushrooms grown and packed in a brine or frozen in Taiwan and China and processed in Hong Kong by cleaning, boiling, slicing, canning and sterilizing, Customs found that for purposes of country of origin marking, the mushrooms are substantially transformed in Hong Kong and are required to be marked as a product of Hong Kong when imported into the U.S. HQ 712811, September 18, 1980.[1]

We believe that neither the information letter nor the mushroom ruling is consistent with the rationale of *National Juice* and the numerous Customs rulings regarding the country of origin marking requirements of imported foods products which are repacked in the U.S. Section 134.25, Customs Regulations (19 CFR 134.25), makes it clear that imported articles which are repacked in the U.S. are subject to the requirements of 19 U.S.C. 1304. As indicated above, this provision requires country of origin marking on repacked J-list articles and other articles incapable of being marked. In our view, packing in cans, is a repacking operation which falls within the purview of this provision inasmuch as it does not change the essential character of the imported crab meat but merely puts the crab meat in a condition ready for sale. We see no reason why crab meat packed in cans should be treated differently than crab meat packed in other types of containers.

Considering the effect of the domestic processing as a whole on the imported crab meat, we find that the processing does not substantially transform it into a product with a new name, character or use. With regard to name, we note that although the imported product may be referred to merely as crab meat and the finished product as canned crab meat, the name of the product, *i.e.*, crab meat, remains essentially the same. The use of the product is also unchanged as a result of the domestic processing. The use of the product is determined prior to importation when the crab meat is extracted from the shell. At that time, the product can no longer be used as whole crab, but can only be used as crab meat. The sorting, blending and other domestic processing steps do not change this

[1]This unpublished ruling, which involves different merchandise than the imported crab meat now under review, does not establish a position under the terms of 19 CFR 177.10(c). *See Superior Wire* v. *United States* 669 F. Supp. 474 (CIT 1987) affirmed 867 F.2d 1409 (Fed. Cir. 1989). Moreover, for all practical purposes, section 1907(b) of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418) makes the mushroom ruling a nullity. The statute provides that imported preserved mushrooms shall not be considered to be in compliance with section 304 of the Tariff Act of 1930 (19 U.S.C. 1304) or any other law relating to the marking of imported articles unless the containers thereof indicate in English the *country in which the mushrooms were grown.*

use.[2] Finally, the character of the crab meat is not changed by the domestic processing. Unlike the processing performed in *Koru* which "vastly changed the character of the fish" from a product with the look of a whole fish to fillets, the domestic processing of the imported crab meat leaves the character of the product virtually unchanged. The finished product looks very similar to the imported product, undoubtedly tastes very similar and has the same characteristics of the imported crab meat (*e.g.*, the quality of the crab meat and the size of the muscle fibers is predetermined). We believe the variety of the crab determines the character of the crab meat, not the sorting, blending, canning and other minor processing performed in the U.S. Therefore, we find that the essential character of the product is imparted by the imported crab meat and not the domestic processing. Both at the time of importation and after the domestic processing, the product is essentially the meat from crabs.

Based on the above considerations, we conclude that the imported crab meat is not substantially transformed as a result of the domestic processing. Therefore, the consumer who obtains the crab meat after the processing is the ultimate purchaser. This determination is consistent with the primary purpose of the country of origin marking statute which is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will. This purpose is not served if the canned crab meat is not required to indicate the country of origin of the imported product.

Holding:

For purposes of 19 U.S.C. 1304, the domestic processing of imported crab meat by thawing, sorting, blending with domestic crab meat, canning and pasteurization does not constitute a substantial transformation. Accordingly, the repacked crab meat is subject to the country of origin marking requirements of 19 U.S.C. 1304 and 19 CFR Part 134 and the importer must follow the certification procedures of 19 CFR 134.25. So long as the country of origin of the crab meat is clearly stated, the label may also indicate that the crab meat is processed in the U.S.

Effective Date:

To enable processors sufficient time to obtain properly labeled new containers for the imported crab meat and to deplete much of the present inventory, the ruling will apply to crab meat imported for consumption or withdrawn from warehouse on or after January 1, 1990.

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[2]Customs has ruled that for purposes of the coastwise laws that crab meat, whether or not canned and/or cooked, is a substantially enough different product from the whole crab from which it is extracted so as to constitute a new and different product. *See* HQ 109504, August 12, 1988; affirmed HQ 109793, May 31, 1989.

(C.S.D. 89–133)

Marking: Country of origin marking of rubber boot bottoms.

Date: September 5, 1989
File: HQ 732448
MRA–2–05 CO:R:C:V 732448 KG
Category: Marking

MICHAEL F. WATSON
THE A.W. FENTON COMPANY INC.
P.O. Box 19937
Columbus, Ohio 43219–0937

Re: Country of origin marking of rubber boot bottoms.

DEAR MR. WATSON:

This is in response to your letter of March 2, 1989, requesting a country of origin ruling on imported rubber boot bottoms. By a letter dated June 2, 1989 (083931), you were provided with a tariff classification ruling for this product.

Facts:

The rubber boot bottom submitted as a sample has a cotton lining and substantial upper portions. The boot bottom looks and functions much like rubber galoshes and, although not complete, provides a total covering for the foot. They would be useful in their imported condition as waterproof footwear if some form of closure was added to keep them on the foot. The upper edge of the side of the boot bottom is marked "made in Korea". However, this marking will be concealed by the leather upper which is sewn over the upper edge of the bottom in the U.S.

Issue:

Whether the rubber boot bottom is substantially transformed in the U.S. so as to except the finished boot from country of origin marking.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. The United States Court of International Trade stated in *Koru North America* v. *United States,* 701 F. Supp. 229, 12 CIT —— (CIT 1988), "In ascertaining what constitutes the country of origin under the marking statute, a court must look at the sense in which the term is used in the statute, giving reference to the purpose of the particular legislation involved. The purpose of the marking statute is outlined in *United States* v. *Friedlaender & Co.,* 27 CCPA 287, 302, C.A.D. 104 (1940), where the court stated that: "Congress intended that the ultimate purchaser should be able to

know by an inspection of the marking on imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. The ultimate purchaser is defined in section 134.1(d), Customs Regulations (19 CFR 134.1(d)), as generally the last person in the United States who will receive the article in the form in which it was imported. If the imported article will be used in manufacture, the manufacturer may be the ultimate purchaser if he subjects the imported article to a process which results in a substantial transformation of the article, even though the process may not result in a new or different article. In such case, the article itself is excepted from marking pursuant to section 134.35, Customs Regulations (19 CFR 134.35), and only the outermost container of the imported article must be marked.

For a substantial transformation to be found, an article having a new name, character, or use must emerge from the processing. *United States* v. *Gibson-Thomsen Co., Inc.* 27 C.C.P.A. 267 (1940). In a country of origin marking case involving imported shoe uppers, *Uniroyal, Inc.* v. *United States,* 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd,* 702 F.2d 1022 (Fed. Cir. 1983), the United States Court of International Trade considered whether the addition of an outsole in the U.S. to imported uppers lasted in Indonesia effects the substantial transformation of the uppers. The court described the imported upper, which resembled a moccasin, and the process of attaching the outsole to the upper. The factors examined included: a comparison of the time involved in attaching the outsole versus the time involved in manufacturing the upper, a comparison of the cost involved in the process of attaching the outsole versus the cost involved in the process of manufacturing the upper, a comparison of the cost of the imported upper versus the cost of outsole and a comparison of the number of highly skilled operations involved in both processes. The court concluded that a substantial transformation of the upper had not occurred since the attachment of the outsole to the upper is a minor manufacturing or combining process which leaves the identity of the upper intact. The upper was described as a substantially complete shoe and the manufacturing process taking place in the U.S. required only a small fraction of the time and cost involved in producing the upper.

An examination of the factors enumerated in *Uniroyal* would be relevant to determine whether or not the imported boot bottom involved in this case is substantially transformed. However no information was submitted regarding the production of the shoe bottom

or the manufacturing process that occurs in the U.S. Therefore, no comparision can be made.

To determine whether a substantial transformation of an article has occurred for the purpose of ascertaining who is the 'ultimate purchaser', each case must be decided on its own particular facts. *Uniroyal* at 224. In *Uniroyal* the court examined the facts presented and determined that the completed upper was the very essence of the completed shoe. The concept of the "very essence" of a product was applied in *National Juice Products* v. *United States*, 628 F. Supp. 978, 10 CIT —— (CIT 1986), where the Court of International Trade determined that frozen concentrated orange juice and reconstituted orange juice that contains imported manufacturing concentrate was not substantially transformed in the U.S. The court agreed with Customs that the manufacturing concentrate "imparts the essential character to the juice and makes it orange juice * * * thus, as in *Uniroyal*, the imported product is the very essence of the retail product. The retail product in this case is essentially the juice concentrate derived in substantial part from foreign grown, harvested, and processed oranges. The addition of water, orange essences, and oils to the concentrate, while making it suitable for retail sale, does not change the fundamental character of the product".

The sample submitted looks like a rubber shoe, covers the entire foot and would be useful in its imported condition as waterproof footwear. In effect, the rubber boot bottom is the very essence of a completes shoe. Based on the facts of this case and an examination of the sample submitted, we find that the imported rubber boot bottom is not substantially transformed in the U.S. In accordance with 19 U.S.C. 1304, the imported boot bottom must be marked with the country of origin in a place which would be legible and readable for the ultimate purchaser. Since there is no substantial transformation in the U.S., the manufacturer is not the ultimate purchaser of the imported boot bottoms. The retail purchaser of the completed boot is the ultimate purchaser. In accordance with section 134.41, Customs Regulations (19 CFR 134.41), the completed boot must be marked with the country of origin of the imported boot bottom in a location where the ultimate purchaser in the U.S. will be able to find the marking easily and read it without strain. The marking on the sample would not satisfy 19 U.S.C. 1304 and 19 CFR Part 134 because it will be hidden by the leather upper which is attached to complete the finished article.

Holding:

The imported boot bottom is not substantially transformed in the U.S. Therefore, the manufacturer of the boot is not the ultimate purchaser of the imported boot bottom. The retail purchaser of the completed boot is the ultimate purchaser and must be informed of the country of origin of the imported boot bottom.

U.S. Customs Service

General Notice

19 CFR Part 24

CURRENT IRS INTEREST RATE USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of calculation of interest.

SUMMARY: The Tax Reform Act of 1986 established a new method of determining the adjusted rate of interest on applicable overpayments or underpayments of Customs duties. The new method provides a two-tier system based on the short-term Federal rate and is adjusted quarterly. This notice advises the public that the interest rates, as set by the Internal Revenue Service, are 11 percent for underpayments and 10 percent for overpayments for the quarter beginning October 1, 1989. It is being published for the convenience of the importing public and Customs personnel.

FOR FURTHER INFORMATION CONTACT: Robert B. Hamilton, Jr., Revenue Branch, National Finance Center, (317) 298–1245.

SUPPLEMENTARY INFORMATION:

BACKGROUND

By notice published in the Federal Register on January 5, 1987 (52 FR 255), Customs advised the public that the Tax Reform Act of 1986 (Pub. L. 99–514), amended 26 U.S.C. 6621, mandating a new method of determining the interest rate paid on applicable overpayments or underpayments of Customs duties. This method provides a two-tier system based on the short-term Federal rate. As amended, 26 U.S.C. 6621 provides that the interest rate that Treasury pays on overpayments will be the short-term Federal rate plus 2 percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus 3 percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less and are to

fluctuate quarterly. The rates are determined during the first month of a calendar quarter and become effective for the following quarter.

The rates of interest for the period of October 1, 1989–December 31, 1989 are 11 percent for underpayments and 10 percent for overpayments. These rates will remain in effect through December 31, 1989, and are subject to change on January 1, 1990.

Dated: November 15, 1989.

CAROL HALLETT,
Commissioner of Customs.

[Published in the Federal Register, November 24, 1989 (54 FR 48591)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

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Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 89–158)

NASSAU SMELTING AND REFINING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82–09–01341

OPINION

[On denial of duty exemption for copper in cathodes from Canada, judgment for the defendant.]

(Decided November 7, 1989)

Grunfeld, Desiderio, Lebowitz & Silverman (*Steven P. Florsheim*) for the plaintiff.
Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jerry P. Wiskin*) for the defendant.

AQUILINO, *Judge:* In this action, the plaintiff wholly-owned subsidiary of the Western Electric Company, itself such a subsidiary of the American Telephone and Telegraph Company, challenges the denial by the U.S. Customs Service of a duty exemption for copper from scrap telephone cables allegedly returned to the United States in cathodes of that metal from Canada. Upon entry, the merchandise was classified under item 612.06, TSUS ("Unwrought copper * * * Other"), with duties assessed thereon at 0.8 cents per pound of copper content.

I

Plaintiff's complaint is not with the classification, but rather with the Service's refusal to take TSUS item 806.30 into account. That item provided for a duty upon the value of processing outside the United States for:

> Any article of metal (except precious metal) manufactured in the United States or subjected to a process of manufacture in the United States, if exported for further processing, and if the exported article as processed outside the United States, or the article which results from the processing outside the United States, is returned to the United States for further processing.

In other words, according to the plaintiff, only the value of the foreign processing of the copper should have been subjected to assessment of duties in view of the following underlying facts and circumstances.[1]

Upon removal from service, Western Electric telephone cables made in this country and comprised of copper wire insulated with paper and encased in a lead sheath were cut to short lengths and placed in a furnace, which melted the lead away and burned the paper off, leaving "ashy" wire, approximately 96 percent pure copper. This wire was shipped to an independent refinery in Canada, where, as described by the plaintiff, it was

> placed in an anode furnace for the purposes of melting the copper and the removal of certain impurities. The "charge" for the furnace includes copper materials from sources other than plaintiff, and also includes a certain amount of copper left over from the previous charge * * *. Because of the size of the anode furnace and the fact that a portion of the previous charge is present in the furnace, it is commercially and practically impossible to process only plaintiff's copper in one given charge * * *.
>
> * * * [T]he resulting molten copper is molded into copper anodes * * *, [which] are then removed to a "tank house" wherein the anodes are subjected to an electrolytic process, resulting in copper cathodes—rectangular shapes of 99.95% pure copper. Specifically, the anodes and certain "starter" cathode sheets are placed in a large tank containing sulfuric acid. An electrical current is applied. Over a period of time, pure copper "migrates" from the anodes to the cathodes, and impurities fall to the bottom of the tank. When the cathodes reach a certain size, they are removed. The remainder of the anodes are fed back into the anode furnace * * *.
>
> The copper cathodes were then imported back into the United States by plaintiff, and shipped to Western Electric's Hawthorne Works * * * [to be] formed into continuous cast copper rod, and, ultimately, at this or another Western Electric facility, into copper wire * * *.[2]

As indicated, in plaintiff's view, this geographic, metallurgic avenue to copper conductor entitled it to demand enforcement of item 806.30.

II

Enforcement of that item has been governed by 19 C.F.R. § 10.9, subsection (a) of which provided at the times of exit and entry:

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[1]The parties have interposed cross-motions for summary judgment, each believing it is entitled to judgment without trial. After review of the motions, the court concludes that they set forth adequate grounds for final disposition of the action, as there are no material facts as to which there exists a genuine issue to be tried within the meaning of CIT Rule 56.

[2]Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment [hereinafter "Plaintiff's Memorandum"], pp. 7–8 (citations omitted).

> Before the exportation of articles subject, on return to the United States, to duty on the value as provided for in item 806.30, a certificate of registration (top portion of Customs Form 4455), shall be filed (in an original only), by the owner or exporter with the District Director of Customs at a time prior to the departure of the exporting conveyance which will permit an examination of the articles * * *.

Subsection (c) provided that, after endorsement by Customs of the report of the examination of the merchandise on the Form 4455, it was to be returned to the exporter "for use in connection with the return of the articles." In accordance with subsection (f), that form certificate of registration was then to be filed with the Service in connection with the entry, plus a declaration by someone "having knowledge of the facts that the articles entered in their processed condition are the same articles covered by the Certificate of Registration."

It is conceded that the foregoing procedure was not followed for the merchandise at issue in this action. That is, at a minimum, the requisite forms 4455 were not filed with Customs. The plaintiff argues that their filing was waived by the Service for all of the entries. The defendant admits waiver (pursuant to 19 C.F.R. § 10.9(i) (1978)[3]) as to one entry, but not in regard to any of the others.[4] The plaintiff does not prove otherwise as to them. Rather, counsel argue that waiver for one makes "it * * * obvious that the production of the Form 4455 was waived for all entries".[5]

The court cannot concur. Not only is a basis for this contention not obvious from the facts presented, the general rule is that an importer must produce all required information and documentation for each entry of merchandise, to assist Customs in reaching a proper determination, and waiver of that basic requirement is on an individual basis only. Of course, this does not mean that exceptions are not made to the general rule, just that the plaintiff has failed to show that any were made for its other entries.[6]

III

With waiver established at least in regard to one of its entries, however, the plaintiff claims that the

> basic underlying issue * * * is whether 806.30 treatment can be afforded to an imported intermediate metal product (cooper cathodes) where such product may contain the identical fungible metal (copper) from sources other than that which was ex-

[3]According to this subsection, if

> the district director concerned is satisfied, because of the nature of the articles or production of other evidence, that the articles are imported in circumstances meeting the requirements of item 806.30 and related headnotes, he may waive the declaration provided for in paragraph[ ] * * * (f) of this section.

[4]*See* Reply of the United States, Defendant, to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment, pp. 1–2 and Exhibit A thereto.

[5]Plaintiff's Memorandum of Law in Opposition to Defendant's Cross-Motion for Summary Judgment [hereinafter "Plaintiff's Reply"], p. 5, n.1.

[6]The court notes in passing that defendant's Exhibit A (covering the entry conceded by the government) clearly indicates that production of the missing documents was "waived", whereas its Exhibit B (for another numbered entry at issue herein) bears no such endorsement for the "documents not produced".

ported from the United States. The Government argues that the subject cathodes were produced from "substituted" copper, and that TSUS item 806.30 does not permit "*substitution.*"[7]

Item 806.30 applied to any article of metal manufactured or subjected to a process of manufacture in the United States. The court finds that the ashy wire was such an article and also that that article was exported from this country for further processing.[8] As for the remaining requirement of item 806.30 that an article be returned for further processing here, the defendant denies that the cathodes satisfied it, to wit:

> * * * [T]he processing performed in Canada transformed copper scrap into a new and complete article of commerce which was the completion of the processing of the copper [*sic*] scrap. The resultant cathodes are a final product not an advanced material. Accordingly, the imported cathodes are not eligible for item 806.30, TSUS, treatment.[9]

Here again, the facts presented control, and they indicate importation of the cathodes for further, final processing at Western Electric. Thus, the remaining requirement was met by the plaintiff if its article of metal which was exported was that article subsequently imported.

The defendant denied plaintiff's protest, apparently primarily due to lack of conviction that the copper sent to Canada was actually incorporated and identifiable in the cathodes. On its part, the plaintiff does not gainsay commingling or even complete substitution[10] of copper from other sources. Plaintiff's statement of facts as to which it contends there is no genuine issue to be tried concedes that its wire was melted in the anode furnace "along with scrap copper from sources other than plaintiff's, copper materials generated in prior refining operations, and some copper from previous furnace charges" [para. 7]; that the "mixing of various sources of copper in the anode furnace * * * is the only commercially practicable procedure by which the subject merchandise could be processed" [para. 10]; and that it is "commercially impossible to process scrap copper in an anode furnace, where the charging material is obtained from only one source" [para. 11]. The anode furnace had a capacity of some 700,000 pounds of material, including the residue of the previous charge. The defendant points out that annual cathode output of the refinery was 900,000,000 pounds, whereas the plaintiff shipped only 4.8 million pounds of ashy wire during the period under consideration. Nevertheless, the plaintiff contends that

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[7]Plaintiff's Reply, p. 1 (emphasis in original).

[8]*Compare, e.g.*, plaintiff's statement of material facts, para. 5 *with* defendant's response thereto.

[9]Brief for the United States, pp. 12–13, *citing Dolliff & Company, Inc.* v. *United States*, 599 F.2d 1015 (CCPA 1979), and *A.F. Burstrom* v. *United States*, 44 CCPA 27, C.A.D. 631 (1957).

[10]*See, e.g.*, Plaintiff's Responses to Defendant's Statement of Additional Facts as to Which There is No Genuine Issue to be Tried, para. 2 ("Plaintiff admits that the imported cathodes could have contained copper derived from sources other than Plaintiff's exported scarp copper").

> [i]t is of no moment that the same molecule that plaintiff shipped to Canada was not necessarily the exact same molecule that was returned[11]

and also that

> nothing contained in the language of TSUS item 806.30, nor the legislative history thereto, prohibits the mixture of metal source material during the foreign processing operation. Defendant's proposed limitation is unsupported by the statute and the legislative history.[12]

Beginning in 1914, the doctrine of "constructive segregation" developed to deal with U.S. goods incorporated in imported foreign merchandise. *See, e.g., Denike* v. *United States,* 5 Ct. Cust.Appls. 364, T.D. 34553 (1914); *Parrot* v. *United States,* 40 CCPA 8, C.A.D. 490 (1952); *United States* v. *Oakville Company,* 402 F.2d 1016 (CCPA 1968); *C.J. Tower & Sons* v. *United States,* 33 Cust.Ct. 14, C.D. 1628 (1954). The test was whether such goods could be removed from the imports "without injury", or whether they had somehow been improved in value or otherwise changed by incorporation into the articles as imported. The logic behind this development, namely, nonimposition on U.S. goods, was ultimately adopted by Congress in paragraph 1615 of the Tariff Act of 1930 and later amended to allow duty-free entry for American articles of metal exported abroad for processing and then imported into the United States for further processing, the provision now at issue herein. *See* Customs Simplification Act of 1954, Pub. L. No. 768, § 202, 68 Stat. 1136, 1137–38 (1954). The report in support of section 202 stated that it would

> permit manufacturers of any article of metal (except precious metal) processed in the United States to export such articles for further processing and at the time of reimportation to pay duty on the cost of processing done in the foreign country.[13]

From this, the plaintiff deduces that the statute allows for substitution in that it was designed

> to benefit *all* United States manufacturers of metal products, who found it necessary or convenient to export metal for a portion of the required processing. Certain manufacturers, or processing procedures, or types of metal (except precious metal), were not excluded; Item 806.30 applies to *all without limitation.*[14]

However, the general rule is that, where grant of a privilege of free entry is concerned, the customs laws are to be construed "most strongly in favor of the grantor." *Becker* v. *United States,* 28

[11]Plaintiff's Memorandum, p. 14.

[12]Plaintiff's Reply, p. 1.

[13]S.Rep. No. 2326, 83rd Cong., 2nd Sess. 5 (1954). *See also* 99 Cong.Rec. H8671–82 (daily ed. July 13, 1953) (statement of Mr. Knox); Valdez, *Expanding the Concept of Coproduction Beyond the Maquiladora: Toward a More Effective Partnership Between the United States and Mexico, and the Caribbean Basin Countries,* 22 Int'l Lawyer 393, 396 (1988) (item 806.30 was intended to "encourage[ ] U.S. corporations to set up a co-production factory in a foreign country in order to utilize the low cost labor in certain regions"); *Operation of the Trade Agreements Program, 40th Report, 1988,* USITC Pub. 2208, pp. 156–59 (1989).

[14]Plaintiff's Reply, p. 2 (emphasis in original).

Cust.Ct. 404, 405, Abs. 56405 (1952). *Cf. Ford Motor Company* v. *United States,* 29 Cust.Ct. 553, A.R.D. 9 (1952).

An aid in interpretation of provisions of the TSUS has been the Tariff Classification Study ("TCS") of November 15, 1960. *See, e.g., Rifkin Textiles Corp.* v. *United States,* 545 CCPA 138, C.A.D. 925, *cert. denied,* 389 U.S. 931 (1967); *United States* v. *Andrew Fisher Cycle Co.,* 426 F.2d 1308 (CCPA 1970). It takes issue with constructive segregation on the ground of anomalous results for U.S. articles incorporated in imported merchandise. The problem, as the study indicates, is not the separability of the articles of domestic origin from the merchandise, but rather proof of incorporation therein. *See* TCS, Schedule 8, Part 1, Explanatory Notes, pp. 12–16. *See also* H.R.Rep. No. 342, 89th Cong., 1st Sess. 48–49 (1965). Thus, for purposes of duty allowance under item 807.00 for U.S. articles assembled abroad, for example, the TCS states that an importer must show (1) that an American part has been assembled into the imported article and (2) that such part was assembled therein without having been changed in condition. *Id.* at 14. *Cf. Samsonite Corporation* v. *United States,* 12 CIT ——, 702 F.Supp. 908 (1988), *appeal docketed,* No. 89–1346 (Fed.Cir. March 17, 1989).

However, under item 806.30, the focus is on the imported goods as an entirety in order to avoid constructive segregation of articles returned to this country which contain non-metal components. As the plaintiff here asserts, the TCS does not state specifically that item 806.30 required that an article of metal returned for further processing had to contain the actual metal of U.S. origin exported. Still, to deduce from this not only that substitution is plausible under the item but that, in its enactment, Congress agreed to substitution thereunder is a different matter altogether. Although a definitive answer to the question of substitution cannot be gleaned from the discernible congressional intent, something resembling a leap of faith is necessary to conclude that those who voted for the item did not intend to require that an article retain at least some identifiable or quantifiable characteristic(s) from this country to which the duty forgiveness would then extend.

By way of comparison, in the drawback statute (19 U.S.C. § 1313(b)) Congress has specifically allowed for substitution of fungible articles of U.S. manufacture in place of imported articles in merchandise bound for export. Underlying this provision, of course, is encouragement of production within the United States, "thus increasing our foreign commerce and aiding domestic industry and labor." *Aurea Jewelry Creations, Inc.* v. *United States,* 13 CIT ——, ——, Slip Op. 89–126, p. 2 (Sept. 7, 1989), *quoting from United States* v. *International Paint Co.,* 35 CCPA 87, 90, C.A.D. 376 (1948). Be that as it may, there is no indication that Congress intended to allow for similar substitution under item 806.30, TSUS. Hence, the court cannot adopt plaintiff's premise, which, in essence, amounts to a doctrine of constructive origin.

In the end, the plaintiff has not persuaded this court that the position of Customs was unlawful, particularly, where it was "commercially and practically impossible"[15] to process plaintiff's scrap alone in Canada. Congress has specifically provided in 28 U.S.C. § 2639(a)(1) that, in an action such as this, the decision of the Service is presumed to be correct and the burden of proving otherwise is on the party challenging that decision. Here, the plaintiff has not borne its burden, and its motion for summary judgment must therefore be denied, with judgment to enter in favor of the defendant on its cross-motion.

[15] *Supra*, page 3; Plaintiff's Memorandum, p. 16. *See* plaintiff's statement of facts, para. 11.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	I
				Item No. and rate	Item N
C89/215	Restani, J. October 30, 1989	BASF Corp.	87-2-00395	Item 409.92 or 409.90 15% or 21%	Item 47 1.8%
C89/216	Restani, J. October 30, 1989	BASF Corp.	87-2-00397	Item 409.90 or 409.92 15%, 20% or 21%	Item 47 1.8%
C89/217	Restani, J. October 30, 1989	BASF Corp.	87-11-01070	Item 409.90 or 409.92 15% or 21%	Item 47 1.8%
C89/218	Restani, J. October 30, 1989	BASF Wyandotte Corp.	80-10-01701	Item 406.50 20%	Item 47 2%
C89/219	Restani, J. October 30, 1989	BASF Wyandotte Corp.	80-10-01809	Item 406.50 20%	Item 47 2%
C89/220	Restani, J. October 30, 1989	BASF Wyandotte Corp.	81-6-00731	Item 406.50 20%	Item 47 2%
C89/221	Restani, J. October 30, 1989	BASF Wyandotte Corp.	83-6-00863	Item 409.90, 409.92., 40.986 or 409.89 Various rates	Item 47 1.9%
C89/222	Restani, J. October 30, 1989	BASF Wyandotte Corp.	85-9-01184	Item 409.54 or 409.90 21% or 22%	Item 47 1.9%
C89/223	Restani, J. October 30, 1989	BASF Wyandotte Corp.	86-6-00693	Item 409.92 15%	Item 47 1.9%
C89/224	Restani, J. October 30, 1989	BASF Wyandotte Corp.	86-6-00820	Item 409.92 or 409.90 15% or 22%	Item 47 1.9%
C89/225	Restani, J. October 30, 1989	BASF Wyandotte Corp.	86-12-01526	Item 409.90 22% or 21%	Item 47 1.9%
C89/226	Restani, J. October 30, 1989	BASF Wyandotte Corp.	86-12-01529	Item 409.92, 409.90 or 409.86 15%, 21% or 10.7%	Item 47 1.8%
C89/227	Musgrave, J. October 31, 1989	Teltex, Inc.	87-2-00343	Item 355.25 Various rates	Item 35 6%, 5

DECISIONS

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
No. and rate		
74.26	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	Richmond-Petersburg Concentrated gravure ink
74.26	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	New York Concentrated gravure ink
74.26	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	Richmond-Petersburg Concentrated gravure ink
74.26	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	New York Concentrated gravure ink
74.26	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	New York Concentrated gravure ink
76.24	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	Charlotte Concentrated gravure ink
74.26 or 2%	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	Charlotte Concentrated gravure ink
74.26	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	Ogdensburg Concentrated gravure ink
74.26	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	Champlain Concentrated gravure ink
74.26 or 1.8%	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	Richmond-Petersburg Concentrated gravure ink
74.26 or 1.8%	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	Champlain-Rouses Pt. Concentrated gravure ink
74.26	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	Richmond-Petersburg Concentrated gravure ink
59.60 5.1% or 4.3%	Agreed statement of facts	New York Roofing material

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V89/15	Tsoucalas, J. [decided] September 28, 1989	Mannesmann Denag Corp.	86-1-00095	Transaction value	Invoice packi invoi

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Index

Customs Bulletin and Decisions
Vol. 23, No. 49, December 6, 1989

U.S. Customs Service

Treasury Decision

Customs Service Decisions

General Notice

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

*U.S. G.P.O. 1989-261-994:80072